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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GUADALUPE TORRES,

Defendant and Appellant.

D073866

(Super. Ct. No. JCF37651)

APPEAL from a judgment of the Superior Court of Imperial County, Marco D. Nunez, Judge. Reversed and remanded with instructions regarding sentence; in all other respects affirmed.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alana Cohen Butler, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury trial, Jose Guadalupe Torres was convicted of one count of assault with a deadly weapon (knife) (Pen. Code, § 245, subd. (a)(1));¹ two counts of inflicting injury on a spouse resulting in a traumatic condition after a prior conviction (§ 273.5, subd. (f)(1)); and one count making criminal threats (§ 422), along with a true finding that Torres personally used a dangerous and deadly weapon in making the threat (§ 12022, subd. (b)(1)). Torres admitted a prior strike (§§ 667, subds. (b)-(i); 1170.12), a prior serious felony conviction (§ 667, subd. (a)), and a prison prior (§ 667.5, subd. (b)). The trial court sentenced Torres to prison for a term of 15 years, eight months.

Torres contends (1) the trial court prejudicially abused its discretion by allowing the People to present extensive testimony from three different witnesses regarding Torres's prior infliction of domestic violence on the victim; (2) insufficient evidence supports the conviction for making criminal threats because the victim did not experience sustained fear; and (3) this matter should be remanded to allow the trial court to decide whether to exercise its newly-conferred discretion to strike the five-year sentence enhancement imposed for Torres's prior serious felony conviction.

We conclude that Torres's first two contentions lack merit. However, we agree that this matter should be remanded to allow the trial court to decide whether to exercise its discretion to strike the five-year sentence enhancement for Torres's prior serious felony conviction.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On March 15, 2017, Torres was homeless and living in a car with his wife E.B. That afternoon, Torres and E.B. entered a Walmart store and went to the MoneyGram counter. E.B. gave the clerk a slip of paper with a false account number and the words "Please call police. He's going to kill me." The clerk did not notice the words, only the false account number, and gave the slip of paper back to E.B. to write the correct number. E.B. turned over the slip and wrote "Call police please," followed by several exclamation points. The clerk then noticed the words on the slip of paper and called the police, giving the phone to E.B. E.B. told the police that Torres was attacking and threatening her, that he had a knife and was willing to use it on the police, and that the police needed to come get him.

When police officers responded to Walmart, they restrained Torres after a struggle, and found multiple knives on his person. E.B. appeared afraid, nervous, and distressed, and she had injuries on several areas of her body, including bruising on her arms and shoulder, scrapes and bruising on her thigh, a cut on her right palm, scratches and bruises on her back, and bruising and swelling on her face. Police interviewed E.B., who described Torres's assaultive conduct toward her over the past two days.

As E.B. told police, when she and Torres were driving around on March 14, 2017, Torres began punching her upper body. After E.B. parked the car, Torres used a sharp long tool to jab at her upper body. Torres then picked up a knife and said threatening words to the effect of: "It's a wrap. You've been sleeping around with all the drug

addicts in Calexico. You don't please me as a wife, and I want to kill you and throw you in the canal." E.B. told police that she took the threat seriously and was in fear for her life, in part because Torres was very aggressive when he said it. Torres then used the handle of the knife to hit E.B. on the arm.

E.B. told police that the next morning, March 15, 2017, Torres brandished a knife and told her to look for drugs for him. That day, Torres also used scissors to stab E.B.'s thighs, and he positioned himself in the car so that he was able to kick E.B. in the face, causing swelling and bruising. Torres then tried to stab E.B. with a knife, but she defended herself with her hands and received a cut on her palm. E.B. told police that because she was in fear for her life, and was worried about ending up as an unidentified body in a canal, she made up a story about having a MoneyGram sent to her at Walmart to get money for Torres to buy drugs. Before they went into Walmart, Torres punched E.B. in the mouth while they were in the parking lot. Sometime during the assaultive conduct, Torres also used the stick of a window washing tool to hit E.B. in the face or the neck.

An information charged Torres with one count of kidnapping (§ 207; count 1); two counts of assault with a deadly weapon² (§ 245, subd. (a)(1); counts 2-3); two counts of inflicting injury on a spouse resulting in traumatic condition after a prior conviction (one count based on the events of March 14; and one count based on the events of March 15)

² One of the assault counts alleged scissors as the deadly weapon (count 2). The other assault count alleged a knife as the deadly weapon (count 3).

(§ 273.5, subd. (f)(1); counts 4-5); one count of making criminal threats (§ 422; count 6), with the further allegation that Torres personally used a dangerous and deadly weapon in doing so (§ 12022, subd. (b)(1)); and three counts of resisting an executive officer (§ 69; counts 7-9)).

At trial, the jury heard a police officer describe what E.B. told him about Torres's assaultive conduct toward her, which we have set forth above. E.B. testified at trial, admitting the statements she made to police, but claiming that she had lied about everything. According to E.B., Torres did not assault her on March 14 and March 15, 2017. E.B. explained that she lied about Torres assaulting her because she wanted him arrested so she could have some time apart from him and so that Torres could detoxify from his drug addiction in jail. According to E.B. most of her injuries were from being robbed in her car on the night of March 14, 2017, and the cut on her hand was from opening a can of pineapple two days earlier.

At trial, the People presented evidence of a prior incident of domestic violence that Torres committed against E.B. in November 2015. E.B. testified that she was staying in a trailer behind a house where her mother (Mother) and grandmother (Grandmother) lived. Torres was supposed to be away at a drug treatment program, but he showed up at the trailer, and Mother and Grandmother did not know that Torres had arrived. Torres was very high, angry, and enraged. Over the course of several hours, Torres repeatedly accused E.B. of sleeping with other people and stabbed her with a long screwdriver on her arms, thighs, side, legs and back, punched her multiple times in the face, and used a box cutter on her. Torres also demanded that E.B. obtain money for him. To appear to

appease Torres's demand for money, E.B. telephoned Grandmother and asked her to place a small safe outside the trailer, although E.B. knew that there was no money in it. When Torres walked toward the bathroom, E.B. ran outside toward the house, but tripped and fell down. E.B. testified that she yelled for Grandmother and Mother to open the door. However, E.B. denied that she yelled about Torres trying to kill her, and she denied making such a statement to a sheriff's department investigator about the incident. According to E.B., Torres pursued her out of the trailer, and held up a screwdriver in front of himself as if he was "going to get me with it." However, E.B. stated that if Torres had meant to stab her with the screwdriver when she was on the ground he would have done so. As E.B. testified, Grandmother and Mother then came outside, Torres stopped what he was doing, and E.B. grabbed the screwdriver. According to E.B., she went into the house, said they should call the police, and Mother did so.

During E.B.'s testimony, the jury was shown four photographs of E.B. depicting her injuries from the November 2015 assault. E.B. admitted that as a result of the assault, as shown in the photos, her face was swollen and bruised, she had two black eyes, and she had bruises and lacerations on her arms and thighs. However, E.B. volunteered during her testimony that the injuries were "non-life threatening."

Over defense counsel's objection, the trial court allowed the People to call Mother and Grandmother to testify about what they witnessed of the November 2015 assault. Grandmother testified that she was worried about E.B. on the day of the November 2015 assault because she hadn't seen E.B. come into the house all day and because of E.B.'s strange behavior in asking for the small safe but not opening the door of the trailer.

Grandmother then described what happened when E.B. ran out of the trailer to the house. Specifically, at around 1:30 a.m. or 2:00 a.m., Grandmother heard E.B. scream. Grandmother opened the door and turned on the outside lights. She saw E.B. on her back with Torres bending over her. As Grandmother testified, "[H]is coat was flared out. He looked like Dracula the way it was. He was over her with a screwdriver coming down. . . . She had both hands on it like this, holding it. But he's strong, and he was like this waving." Grandmother believed that "He was going to kill her," and she heard E.B. screaming "He's killing me." After Torres backed off, E.B. told Grandmother and Mother that they should *not* call the police. Grandmother perceived that E.B. was in terrible pain, and E.B.'s face was so swollen she was unrecognizable.

Mother's testimony was very brief. Early in the morning, she heard E.B. scream, "Help me. He's trying to kill me." She went outside behind Grandmother, and saw E.B. on the ground, with Torres bending over her.

The jury found Torres guilty of one count of assault with a deadly weapon (knife) (§ 245, subd. (a)(1)); two counts of inflicting injury on a spouse resulting in traumatic condition after a prior conviction (§ 273.5, subd. (f)(1)); and one count making criminal threats (§ 422) with a true finding that Torres personally used a dangerous and deadly weapon (§ 12022, subd. (b)(1)). The jury found Torres not guilty on the remaining counts. Torres admitted a prior strike (§§ 667, subds. (b)-(i); 1170.12), a prior serious felony conviction (§ 667, subd. (a)), and a prison prior (§ 667.5, subd. (b)), which were based on his prior conviction of assault with a deadly weapon on E.B. arising from the November 2015 assault.

Torres filed a motion seeking to strike his prior strike, which the trial court denied. The trial court imposed a sentence of 15 years, eight months in prison.

II.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence About Torres's November 2015 Assault on E.B.*

Torres's first contention is that the trial court abused its discretion under Evidence Code section 352 because it did not adequately limit the amount of evidence that the People presented concerning Torres's November 2015 assault on E.B.

Under Evidence Code section 1101, subdivision (a), unless an exception applies, evidence of a person's character, including evidence of specific instances of past conduct, is inadmissible when offered to prove the person's conduct on a specified occasion. One exception is set forth in Evidence Code section 1109, subdivision (a)(1), which provides that, with certain exceptions not relevant here, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." As relevant here, domestic violence includes causing bodily injury to a spouse. (Evid. Code, § 1109, subd. (d)(3); Pen. Code, § 13700, subds. (a), (b).) Torres does not dispute that Evidence Code section 1109 applies here, as he was charged with committing acts of domestic violence against E.B. in this matter, and the acts he committed against E.B. in November 2015 were also acts of domestic violence. However, Torres contends that at least *some* of

the evidence of the November 2015 assault should have been excluded pursuant to Evidence Code section 352.

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In applying Evidence Code section 352, the trial court enjoys "broad discretion," and " '[a] trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion.' " (*People v. Clark* (2016) 63 Cal.4th 522, 586.) A trial court's exercise of its discretion under section 352 " 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.) " ' "The 'prejudice' referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " [Citation.]' . . . [E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*People v. Scott* (2011) 52 Cal.4th 452, 491.) When deciding whether evidence of a defendant's prior acts of domestic violence should be excluded under Evidence Code section 352, the court "must consider such factors as its

nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917 (*Falsetta*) [discussing the application of Evid. Code, § 352 in the equivalent situation of the admission of prior sexual offenses under Evid. Code, § 1108].) "Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [prejudice of uncharged acts lessened because they were "no more inflammatory" than the charged offenses].)

Focusing on the fact that three witnesses testified about the November 2015 assault, and that the jury was shown four photographs of E.B.'s injuries, Torres argues "[t]he admission of this unlimited, vivid, and inflammatory evidence without utilizing less inflammatory alternatives was extremely prejudicial." Torres contends that "the court should have excluded all, if not most, of the evidence relating to the 2015 incident," and should have considered "less prejudicial alternatives."

As we will explain, we reject Torres's challenge and conclude that the trial court acted well within its discretion when deciding the scope of evidence about the November

2015 assault to admit into evidence. As the trial court observed, the evidence of the November 2015 assault was highly probative propensity evidence going to the issue of whether Torres committed the crimes against E.B. he was charged with in the present case. The prior domestic violence involved the same victim, the same conduct of stabbing the victim with a tool and punching her, and it occurred within a year and a half of the charged crimes. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917 ["the probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses"].) Indeed, " '[t]he principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.' " (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531-532.)

Moreover, because E.B. recanted her statements to police about Torres assaulting her on March 14 and 15, 2017, the evidence that Torres committed a similar prior assault on E.B. within the last year and half was even more relevant than it otherwise would have been because the jury was required to decide which version of E.B.'s story was true: the one in which Torres assaulted her, or the one in which she sustained injuries from a robbery and lied about Torres assaulting her. Torres appears to argue that evidence of the November 2015 domestic violence was not needed to impeach E.B.'s credibility because E.B. was already effectively impeached at trial when she was confronted with the statements she made to the police about the instant offense. We disagree. On the contrary, it is precisely *because* there was a conflict in E.B.'s statements about whether she was assaulted by Torres on March 14 and 15, 2017 that evidence of Torres's similar domestic violence toward E.B. in November 2015 was highly probative.

Torres contends that it was an abuse of discretion for the trial court to admit the testimony of Grandmother and Mother about the November 2015 assault over defense counsel's objection. In the trial court, Torres argued that the testimony of those witnesses was not necessary because E.B. had admitted that the November 2015 assault took place and fully described its details to the jury. Defense counsel argued that the testimony of other witnesses would therefore be "cumulative" and "overkill." The trial court acknowledged the concern that the testimony could be cumulative, but it concluded that the testimony of Grandmother and Mother would be relevant to clarify what actually happened at the end of the November 2015 incident. As the trial court observed, the prosecutor's questioning of E.B. seemed to indicate that E.B. may have been minimizing what occurred or giving a different version of events from prior statements. Specifically, as the trial court pointed out, there appeared to be a disagreement on what E.B. yelled as she ran toward the house, in that she now denied saying that Torres was trying to kill her. The trial court therefore allowed Grandmother and Mother to testify about what they observed of the November 2015 incident.

Grandmother provided useful and relevant testimony about what she saw that differed from E.B.'s account. Grandmother stated that E.B. said, "He's killing me." Further, although E.B. testified that Torres was merely holding the screwdriver out in front of her and would have stabbed her with it if that is what he meant to do, Grandmother testified that she saw Torres bending over E.B. trying to stab her with it, while E.B. was struggling against him, with her hand on the screwdriver. Grandmother's testimony also provided evidence of E.B.'s reluctance to report Torres to the police on

November 2015, as Grandmother testified that E.B. told them *not* to call the police. The jury could consider that evidence in determining whether to believe E.B.'s recantation in this instance. Mother's testimony was very brief but was also relevant evidence to show that E.B.'s testimony had minimized the November 2015 assault. As Mother testified, she heard E.B. scream, "Help me. He's trying to kill me," although E.B. had insisted during her testimony that she did not make such a statement.

We conclude that Grandmother's and Mother's testimony provided relevant probative evidence about the November 2015 assault that was not contained in E.B.'s testimony. The trial court was therefore well within its discretion to determine that the testimony was not cumulative, and instead provided valuable probative evidence. Specifically, Grandmother and Mother's testimony indicated that E.B. feared for her life during the November 2015 assault, and that when Grandmother and Mother intervened Torres was involved in a serious and dangerous struggle with E.B.³

Torres also contends that it was an abuse of discretion for the trial court to admit the photographs of E.B.'s injuries from the November 2015 assault over defense counsel's objection. However, we note that when defense counsel objected to the admission of the

³ In his reply brief, Torres argues that the testimony of Mother and Grandmother should not have been admitted because its relevance was merely with respect to "impeachment of a victim over collateral issues relating to an uncontested prior act of domestic violence." We disagree. Due to E.B.'s recanting of what she told police in this matter, E.B.'s credibility about Torres's violence toward her was the central issue at trial. For that reason the details of whether Torres was trying to kill E.B. during the November 2015 assault, despite what she claimed at trial, was highly relevant and not merely impeachment on a collateral issue.

photographs, the trial court reasonably put limits on that evidence. Specifically, the trial court allowed the admission of only four of the eight photographs offered by the People, excluding all photographs that showed E.B. hooked up to medical devices, excluding one photograph that was cumulative, and ordering the People to crop one of the photos to remove depiction of a neck brace on E.B. In response to defense counsel's concern that the jury may confuse photographs of the injuries at issue in this prosecution with the injuries from November 2015, the trial court ordered that each of the photographs from November 2015 be marked on the back to clarify that they were from November 2015. In admitting the photographs the trial court explained that the severity of the injuries that E.B. incurred in the November 2015 assault was a disputed issue on which the photographs were relevant evidence. As the trial court observed, E.B.'s "tone was rather nonchalant" when she described the November 2015 assault and she had attempted to minimize the seriousness of the injuries by describing them as "non-life threatening." We conclude that the trial court was well within its discretion to conclude that the photographs from November 2015 were highly probative to show that Torres had committed a prior incident of domestic violence against E.B. that caused serious injuries similar to the injuries E.B. incurred in this case, and that with the limitations imposed by the trial court, the photographs were not unduly prejudicial.

In sum, we conclude that the trial court was within its discretion with respect to the scope of evidence admitted at trial concerning the November 2015 assault, and the evidence was not required to be excluded pursuant to Evidence Code section 352.

B. *The Conviction for Making a Criminal Threat Is Supported by Substantial Evidence*

We next consider Torres's contention that his conviction for making a criminal threat (§ 422) is not supported by substantial evidence.

"In considering a challenge to the sufficiency of the evidence . . . , we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' "

(*People v. Albillar* (2010) 51 Cal.4th 47, 59-60, citations omitted.)

As set forth in section 422, subdivision (a): "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her

own safety or for his or her immediate family's safety, shall be punished" Our Supreme Court has explained that to prove the offense of making a criminal threat under section 422, "[t]he prosecution must prove '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat . . . was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' " (*In re George T.* (2004) 33 Cal.4th 620, 630 (*George T.*)) "[A]ll of the surrounding circumstances should be taken into account to determine if a threat falls within the proscription of section 422." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

Torres challenges the sufficiency of the evidence supporting the fourth element set forth above, namely that E.B. was "in sustained fear" for her safety. (*George T., supra*, 33 Cal.4th at p. 630.)

Section 422 does not provide a definition of sustained fear. In the absence of a statutory definition, the court in *People v. Allen* (1995) 33 Cal.App.4th 1149 (*Allen*), took the approach of "[d]efining the word 'sustained' by its opposites," concluding "that it means a period of time that extends beyond what is momentary, fleeting, or transitory."

(*Id.* at p. 1156.) In *Allen*, the evidence supported a finding of sustained fear because the defendant was "armed, mobile and at large" for a sustained period of 15 minutes following a threat to kill the victim and her daughter (his ex-girlfriend) against whom he had a long history of stalking and domestic violence. (*Id.* at pp. 1155-1156.) Employing *Allen's* definition of sustained fear, other cases have concluded that the evidence supported a finding of sustained fear because the victim experienced fear that was more than momentary, fleeting or transitory and therefore sufficiently long to satisfy the statute. (See, e.g., *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1342; *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.)

Here, the charge that Torres made a criminal threat to E.B. was based on the statement that E.B. told police Torres made to her on March 14, 2017: "It's a wrap. You've been sleeping around with all the drug addicts in Calexico. You don't please me as a wife, and I want to kill you and throw you in the canal." E.B. told police that Torres was holding up a knife when he made the statement, which he stated in a very aggressive tone, and that she took the threat seriously and was in fear for her life.

The statements that E.B. made on March 15, 2017, provided substantial evidence that she was still in fear that Torres would carry out the threat to kill her that he made on March 14, 2017. First, on the note that she wrote to the MoneyGram clerk, E.B. stated "Please call police. He's going to kill me." Second, according to the police officer who interviewed E.B., she stated that she went to Walmart because she was in fear for her life on March 15, 2017, and that when she wrote the note to the clerk she believed that Torres was going to kill her. Indeed, E.B. told the police that she decided to go to Walmart

because she was worried about ending up as an unidentified body in a canal, just as Torres had threatened the day before.

Moreover, Torres's continued assaultive conduct toward E.B. on March 15, 2017, would have given E.B. a reason to believe that Torres still meant to carry out the threat to kill her that he made the day before. Specifically, E.B. told police that on March 15, 2017, Torres tried to stab her with a knife, stabbed her with scissors, kicked her in the face, and punched her in the mouth. A jury reasonably could conclude that E.B. interpreted that conduct as an indication that Torres still meant to carry out his threat to kill her.

The jury also could reasonably rely on evidence of Torres's November 2015 assault in determining that E.B. was in sustained fear on March 14 and 15, 2017. Specifically, because there was evidence that E.B. believed Torres had tried to kill her in November 2015, a reasonable juror could conclude that based on that experience, E.B. suffered sustained fear when Torres threatened to kill her and throw her body in the canal. Based on the November 2015 assault, E.B. knew what Torres was capable of doing to her, including that he could attack her even when she attempted to get away from him.

In sum, there was ample evidence presented at trial to support a finding that when Torres threatened to kill E.B. and dump her body in the canal on March 14, 2017, E.B. took that threat seriously, and that on March 15, 2017, E.B. *still* believed that Torres intended to carry out his threat. Under any definition, when the victim of a threat continues to fear that the threat will be carried out the day after the threat was made, the

victim has experienced *sustained* fear, as it is fear lasting for "a period of time that extends beyond what is momentary, fleeting, or transitory." (*Allen, supra*, 33 Cal.App.4th at p. 1156.)

C. *Remand Is Warranted for the Trial Court to Decide Whether to Exercise Its Discretion to Strike the Five-Year Enhancement for Torres's Prior Serious Felony*

The trial court imposed a five-year prison term enhancement under section 667, subdivision (a) based on Torres's admission that he incurred a prior serious felony. (§ 667, subd. (a).) On September 30, 2018, after Torres was sentenced, the Legislature enacted Senate Bill 1393 (Stats. 2018, ch. 1013, §§ 1-2), which amended section 1385 to give the trial court discretion to strike five-year enhancements for prior serious felony convictions under section 667, subdivision (a). Effective January 1, 2019, Senate Bill 1393 amended section 1385 by deleting subdivision (b), which previously stated: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." Torres contends that because his conviction is not yet final, we should remand this matter to allow the trial court to decide whether to exercise its discretion to strike the five-year enhancement imposed under section 667, subdivision (a).

The People agree that the amendment to section 1385 providing the trial court with discretion to strike a five-year enhancement for a prior serious felony conviction under section 667, subdivision (a) applies retroactively to non-final cases. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972 [Senate Bill 1393 "applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing,

based on a prior serious felony conviction, provided the judgment of conviction is not final when [it] becomes effective on January 1, 2019"].) However, the People contend that it would be futile to remand to the trial court in this instance because the comments the trial court made at sentencing about the seriousness of Torres's crimes in deciding to impose an upper term sentence and to deny Torres's motion to strike his prior strike show that the trial court would not have exercised its discretion to strike the five-year enhancement for the prior serious felony if it had been presented with that issue.

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) Only if " 'the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.' " (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901; see also *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand to exercise discretion to strike prior strike convictions is not required where "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations"].) Here, the trial court did not make any comments at the sentencing hearing that would permit us to conclude that the court categorically would not exercise its discretion to strike the five-year enhancement for Torres's prior serious felony. We therefore remand this case to allow the trial court to decide whether to exercise its discretion to strike the five-year

enhancement imposed under section 667, subdivision (a). We express no opinion as to how the trial court should exercise that discretion on remand.

DISPOSITION

The judgment is reversed and remanded to the trial court with directions that it decide whether to exercise its discretion to strike the five-year enhancement for Torres's prior serious felony conviction. If the trial court decides to exercise its discretion to strike the enhancement, it shall resentence Torres. If the trial court does not strike the enhancement, it shall reinstate the sentence. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

DATO, J.